Majistret, Mahkamah Majistret Rawang & Anor v Gurdeep Singh a/l Atma Singh

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 44-13 OF 1999
KANG HWEE GEE J
25 MARCH 2000

Criminal Procedure *— Habeas corpus — Detention of drug dependant — Duty of magistrate upon receipt of recommendation of rehabilitation officer — Whether strict approach leaning in favour of detainee as in preventive detention cases applicable to detention of drug dependant — Whether detainee was given opportunity to make representation — Discrepancy between report of rehabilitation officer and certification of medical officer — Whether order was legal — Drug Dependant (Treatment and Rehabilitation) Act 1983 s 6(1)(a) & (b)*

The applicant's son was detained for treatment and rehabilitation under the amended s 6(1)(a) of the Drug Dependant (Treatment and Rehabilitation) Act 1983 ('the Act') by the order of the magistrate. The applicant applied for a writ of habeas corpus for the release of his son on the following grounds: (i) the detainee was not afforded the opportunity to make representation; (ii) the magistrate relied on s 6(3) and (4) of the Act which at the time the order was made was no longer in existence; and (iii) there was a discrepancy between the report of the rehabilitation officer and the certification of the medical officer in that the certificate said that the detainee was dependent on morphine whereas the report of the rehabilitation officer said that he was dependent on heroin.

Held:

(1) Under the amended s 6(1), the magistrate is now duty bound to order the detainee to either undergo treatment, rehabilitation and supervision under sub-s (1)(a) or to order him to undergo supervision only under sub-s (1)(b), upon receiving the recommendation of the rehabilitation officer. With the objective of the Act now sharply in focus, there is now a need to treat an application for habeas corpus against a detention made thereunder differently from those involving preventive detention per se. The strict approach leaning in favour of the detainee requiring numerous conditions precedents before the order could be made by the magistrate should no longer be followed (see pp 121H–122A, 123B–C).

(2) Viewed from an objective standpoint, it was clear that the detainee did not wish to make any representation against the adverse reports of the medical officer and the rehabilitation officer as by asking to be put under supervision instead of being sent for rehabilitation, he must be taken to have admitted to being a drug dependant and therefore had no basis to make any representation against it. He could, had he wanted to, challenge the allegation against him which he did not. The allegation that he had not been given the opportunity to make representation must therefore be dismissed as untrue (see p 124G–I).

(3) Under the amended s 6 of the Act, the subjective satisfaction of the magistrate is now no longer required before he decides to send the detainee for treatment and rehabilitation. In fact, he is now required as a matter of course to make the order upon receiving the recommendation of the rehabilitation officer. Therefore, from the objective standpoint, the fact that he may have taken irrelevant or extraneous matters under sub-s (3) and (4) into consideration in making that order was of no consequence as he was required to make the order regardless (see pp 125I–126B).

(4) The discrepancy in the reports gave rise not only to doubts as to the nature of the drug the detainee had become dependent on but also to the wider question of whether he was a drug dependent in the first place to justify the making of the order under s 6(1). The rehabilitation officer is duty-bound to make a proper and accurate inquiry on the status of the detainee before he submits his recommendation to the magistrate. In the instant case the discrepancy must lead to the assumption that the rehabilitation officer had failed to direct its mind to and therefore had failed to determine that the detainee was dependent on any drug. The order made by the magistrate was under the circumstances absolutely unsustainable as the discrepancy was so fundamental as to have affected its legality having struck at its very objective of treating and rehabilitating drug dependants. It was also serious enough to affect the integrity of the rehabilitation officer on whom the magistrate had to rely on in making the order to send the detainee to the rehabilitation centre, that he should not have made the order (see pp 126D–H).

[Bahasa Malaysia summary

Anak lelaki pemohon telah ditahan untuk rawatan dan pemulihan di bawah s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 terpinda ('Akta tersebut') melalui satu perintah majistret. Pemohon telah memohon writ habeas corpus untuk pembebasan anak lelakinya atas alasan-alasan berikut: (i) orang tahanan tidak diberikan peluang untuk membuat representasi; (ii) majistret bergantung pada s 6(3) dan (4) Akta tersebut yang tidak lagi wujud pada masa perintah tersebut dibuat; dan (iii) wujudnya perselisihan di antara laporan pegawai pemulihan dan pengesahan pegawai perubatan iaitu perakuan tersebut mengatakan orang tahanan menagih morfin walhal laporan pegawai pemulihan mengatakan bahawa orang tahanan menagih heroin.

Diputuskan:

(1) Di bawah s 6(1) yang terpinda, majistret kini wajib memerintah supaya orang tahanan sama ada menjalani rawatan, pemulihan dan penyeliaan di bawah sub-s (1)(a) atau untuk mengarahnya menjalani penyeliaan sahaja di bawah sub-s (1)(b), selepas menerima pengesyoran pegawai pemulihan. Memandangkan

Akta tersebut sekarang mempunyai fokus yang lebih jelas, kini terdapat keperluan untuk melayan permohonan untuk habeas corpus terhadap penahanan yang dibuat di bawahnya dalam cara yang berlainan daripada permohonan yang melibatkan penahanan menegah sahaja. Pendekatan tegas yang cenderung kepada orang tahanan yang menghendaki pelbagai syarat sebelum perintah boleh dibuat oleh majistret tidak harus terus diikut (lihat ms 121H–122A, 123B–C).

(2) Dari sudut pandangan yang objektif, adalah jelas bahawa orang tahanan tidak ingin membuat apa-apa representasi terhadap laporan bertentangan pegawai perubatan dan pegawai pemulihan kerana dengan meminta supaya diletak di bawah penyeliaan dan bukan dihantar untuk pemulihan, beliau mestilah dianggap telah mengaku menagih dadah dan dengan itu tidak mempunyai dasar untuk membuat apa-apa representasi terhadapnya. Beliau boleh, sekiranya beliau ingin, untuk mencabar pendakwaan terhadapnya tetapi ia tidak berbuat demikian. Pendakwaan bahawa beliau telah tidak diberikan peluang untuk membuat representasi mestilah disingkirkan sebagai tidak benar (lihat ms 124G–I).

(3) Di bawah s 6 Akta tersebut yang terpinda, kepuasan subjektif majistret kini tidak lagi diperlukan sebelum beliau memutuskan untuk menghantar orang tahanan untuk rawatan dan pemulihan. Pada hakikatnya, beliau kini dikehendaki membuat perintah tersebut selepas menerima pengesyoran pegawai pemulihan. Maka, daripada sudut pandangan objektif, hakikat bahawa beliau mungkin telah mengambil kira hal yang tidak relevan atau perkara yang luar daripada hal yang berkaitan di bawah sub-s (3) dan (4) dalam membuat perintah tersebut tidak padah kerana beliau tetap dikehendaki membuat perintah tersebut walau apapun keadaannya (lihat ms 125I–126B).

(4) Perselisihan dalam dua laporan itu membangkitkan bukan sahaja keraguan mengenai jenis dadah yang diketagihkan oleh orang tahanan bahkan juga soalan yang lebih luas sama ada beliau merupakan penagih dadah untuk menjustifikasikan pembuatan perintah di bawah s 6(1). Pegawai pemulihan wajib menjalankan penyiasatan yang wajar dan tepat mengenai kedudukan orang tahanan sebelum menyerahkan pengesyoran kepada majistret. Dalam kes ini, perselisihan tersebut mestilah membawa kepada andaian bahawa pegawai pemulihan telah gagal memberi perhatian dan dengan itu telah gagal memastikan bahawa orang tahanan menagih apa-apa dadah. Di bawah keadaan ini, perintah yang dibuat oleh majistret tidak boleh kekal secara mutlak kerana perselisihan begitu adalah begitu asas sekali hinggakan menjejaskan kesahihannya memandangkan ia telah mencabar objektif untuk merawat dan memulihkan penagih dadah. Ia juga cukup serius untuk menjejaskan ketulusan pegawai pemulihan pada siapa majistret terpaksa bergantung dalam membuat perintah untuk menghantar orang tahanan kepada pusat serenti,

dan beliau tidak sepatutnya membuat perintah tersebut (lihat ms 126D–H).]

Cases referred to

Ahmad Bashid bin Abdul Malek & Ors v Timbalan Menteri Dalam Negeri & Ors and other appeals [1999] 3 MLJ 369 (refd)
Ang Gin Lee v PP [1991] 1 MLJ 498 (refd)
Aw Ngoh Leang v Inspector General of Police & Ors [1993] 1 MLJ 65 (refd)
Chiew Kam Sing v Ketua Institusi Pusat Pemulihan Kampung Selamat & Ors Wilayah Persekutuan Permohonan Jenayah No 44–36–99 (refd)
Datuk James Wong Kim Min, Re [1976] 2 MLJ 245 (refd)
Hoo Thian Siong v PP [1988] 2 MLJ 401 (refd)
Kamaruzaman bin Yahaya v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications [1997] 5 MLJ 256 (refd)
Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1991] 2 MLJ 472 (refd)
Lim Thian Hok v Minister of Home Affairs & Anor and other applications [1993] 1 MLJ 214 (refd)
Loi Hing Chai v Ketua Komandan Pusat Pemulihan Akhlak Pusat Serenti, Sungai Petani Kedah Darul Aman & Anor and other appeals [1999] 3 AMR 2896 (refd)
Mahmod bin Jaudin v Penguasa Pusat Serenti Sungai Besi Selangor & Ors [1996] 3 AMR 2920 (refd)
Mohd Shahriman Mohd Khairil v PP & Anor [1998] 2 CLJ 855 (refd)
PP v Koh Yoke Koon [1988] 2 MLJ 301 (refd)
Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 3 MLJ 28 (refd)
Reverend Thomas Pelham Dale (1881) 6 QBD 376 (refd)
Roshidi bin Mohamed, Re [1988] 2 MLJ 193 (refd)
Sanuar Kamarudin bin Ahmad v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1996] 5 MLJ 1 (refd)

Legislation referred to

Drug Dependant (Treatment and Rehabilitation) Act 1983 s 6(1)(a), (b), (3), (4)
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)
Federal Constitution art 149, Part XI
Preservation of Public Security Ordinance 1962 of Sarawak
Public Order and Prevention of Crime (Procedure) Rules r 3(2)
Restricted Residence Enactment 1933

T Santakumari (*Pramjit Kaur and Neeta S Singh* with her) (*Mann & Associates*) for the appellant.
Kamaludin Mohd (Senior Federal Counsel) for the respondent.

Kang Hwee Gee J: This is a motion for the issuance of a writ of habeas corpus under Chapter XXXVI of the Criminal Procedure Code for the release of the applicant's son one Gurdeep Singh, who was detained for treatment and rehabilitation at the Pusat Pemulihan, Sungai Ruan, Pahang under the amended s 6(1)(a) of the Drug Dependant (Treatment and Rehabilitation) Act 1983 ('the Act') by the order of the Magistrate Rawang for a period of two years.

The affidavit in support of the motion (encl 14 exh KMS-1) had to be made by his father Atma Singh as the son was held incommunicado at the Pusat Pemulihan, at Sungai Ruan — an averment which was not disputed by the respondents.

The documents exhibited with his affidavit supporting this motion were incomplete and illegible, but the motion was kept alive fortunately by the grace of Mr Kammaruddin bin Md Said, the senior federal counsel appearing for the respondents who had taken upon himself the diligent task of supplying a complete transcript of the notes of the proceeding before the Magistrate. They were exhibited in his affidavit in reply as exhs KMS-1–5.

The affidavit sets out the grounds for believing that his son Gurdeep Singh had been wrongfully detained by the order of the magistrate. But at the hearing of the motion before me counsel for the applicant M/s T Shanthakumari relied only on three reconstituted grounds, either of which she submitted was sufficient for this court to issue habeas corpus for the release of Gurdeep Singh from the centre.

First, she submitted that the detainee was not afforded the opportunity to make representation, that is to say, the right as defined in the judgment of Suriyadi J in *Mohd Shahriman Mohd Khairil v PP & Anor* [1998] 2 CLJ 855 at p 864:

> to challenge, deny or reject whether by him personally, his solicitor, parents or representative.

In the context of the present motion, she submitted that the notes of the proceeding as recorded by the magistrate which was obtained from the Magistrate Court Rawang, and exhibited as MN-3 in the supporting affidavit of the applicant did not show that the detainee was given such an opportunity to make representation contrary to the requirement under s 6(1) of the Act.

Next, she submitted that in making the order of detention under s 6(1)(a) of the Act the magistrate had relied on s 6(3) and (4) of the Act which at the time the order was made was no longer in existence.

Finally, she submitted that there was a serious discrepancy between the report of the Pegawai Pemulihan Dadah and the certification of the medical officer who conducted the required test on Gurdeep Singh. The certificate of the medical officer which was annexed to the application of the Pegawai Pemulihan Dadah says Gurdeep Singh was dependant on morphine whereas in his report the Pegawai Pemulihan had represented to the magistrate that Gurdeep Singh was dependant on heroin.

The law

In order that the judgment which I shall deliver shortly may be properly understood, I propose to set out in brief the law of habeas corpus as it is applied against preventive detention and to state my view why it should not be applied in its entirety against a mere treatment and rehabilitative order made under the amended s 6 of the Drug Dependant (Treatment and Rehabilitation) Act 1983.

Habeas corpus against preventive detention

The writ of habeas corpus in so far as it is applied to quash executive decisions is directed mainly against preventive detentions by the use of special powers under laws promulgated under Part XI of the Federal Constitution against subversion, organized violence, and crimes prejudicial to public — where the court takes upon itself to scrutinize each and every step taken by the detaining authority to ensure that the detention is free from procedural ultra vires that is to say, the breach of any mandatory provision of the detaining statute.

The oft-cited dictum of Brett LJ in the English case of *Reverend Thomas Pelham Dale* (1881) 6 QBD 376 at pp 461, 469 and 470 often provides the basis why there is need to keep such strict vigilence on the liberty of the subject in that country:

> Then comes the question upon the habeas corpus It is a general rule ... that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.

The same judicial policy is followed here in our jurisdiction as Hashim Yeop Sani SCJ in *PP v Koh Yoke Koon* [1988] 2 MLJ 301 said at p 302:

> Detention not in accordance with law is inconsistent with the fundamental right guaranteed under art 5(1) of the Constitution. Where the law deals with detention, there are abundant authorities to show that the provisions of such a law must be construed strictly and in case of doubt the court should lean in favour of the subject.

Hence in *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28, a detention made in breach of r 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 which requires the unrepresented detenu to be served with two copies of Form 1 was held to be unsustainable as the detenu was only served with one copy of the said form. The service of Form 1 which notifies the detenu of his right to make representation to the advisory board was held to be a mandatory requirement of the Rules. Habeas corpus was issued to quash the detention.

The decision in *Puvaneswaran* was confirmed and applied by the Supreme Court in *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65 wherein it was held that a breach of r 3(2) of the Public Order

and Prevention of Crime (Procedure) Rules ('the Rules') cannot be cured merely by applying the maxim de minimis non curat rex (the law does not concern itself with trifles) as the High Court had done. It was reiterated that due compliance of the Rule was mandatory and the disobedience of the rule by serving the detenu with only one copy vitiated the order of detention even though no real prejudice has ensued to the detainee.

In *Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1991] 2 MLJ 472 a restricted residence order made under the Restricted Residence Enactment 1933 was held by the Supreme Court to be invalid by reason that he was served with an unsigned copy of an order purportedly issued by the Minister and which merely bore the rubber stamped words 'TT Dato Megat Junid bin Megat Ayob' in the space intended for his signature.

In *Lim Thian Hok v Minister of Home Affairs & Anor and other applications* [1993] 1 MLJ 214, the High Court ruled that a detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') was invalid, the Minister having stated two grounds of detention conjunctively in contravention of s 4(1) of the Ordinance under which the Minister was empowered to issue a detention order based only on any one of the two grounds. It was held that the requirement was mandatory to dispel any challenge to the detention order being vague or passed mechanically by merely reproducing the language of s 4(1) of the Ordinance.

Habeas corpus against an order under the Drug Dependant (Treatment and Rehabilitation) Act 1983

A rehabilitative order made by a magistrate under s 6 of the Drugs Dependant (Treatment and Rehabilitation) Act 1983 however, is not in the strict sense a preventive detention as its primary aim is the rehabilitation and treatment of the drug dependant for his own benefit. Hence for some years the question whether or not habeas corpus could issue under the circumstances, remained very much a moot point until *Re Roshidi bin Mohamed* [1988] 2 MLJ 193.

In that case Mohamed Arif J of the Alor Setar High Court issued the writ merely on account of the learned magistrate's failure to keep any record of the proceeding before her. It was held that under the circumstances it was impossible for her to show that she had complied with the mandatory requirement of s 6 of the Act to detaining the person at the Serenti rehabilitation centre at Sungai Petani and therefore the detainee must be released. The ruling was upheld on appeal to the Supreme Court. The propriety of the issuance of the writ of habeas corpus was never questioned.

That the order is amenable to a writ of habeas corpus is now beyond reproach following the concurrent decisions of the Court of Appeal in *Loi Hing Chai v Ketua Komandan Pusat Pemulihan Akhlak Pusat Serenti, Sungai Petani Kedah Darul Aman & Anor (and 2 other appeals)* [1999] 3 AMR 2896 and *Ahmad Bashid bin Abdul Malek & Ors v Timbalan Menteri Dalam Negeri & Ors and other appeals* [1999] 3 MLJ 369 — which have ruled that the

issuance of the writ is co-extensive with the issuance of an order of certiorari.

There are a number of High Court judgments granting habeas corpus against detention orders made by magistrates under the previous s 6 of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 the grant of which appeared to have been based almost entirely on precedents of preventive detention under laws promulgated under Part XI of the Federal Constitution.

Invariably the same strict criteria used to test whether a detaining authority had complied with the strict requirement of procedure in the detaining process when the executive exercises its special powers of preventive detention — were applied — without so much as considering the different objective of the detention under the Drug Dependant (Treatment and Rehabilitation) Act 1983.

Thus in *Sanuar Kamarudin Bin Ahmad v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1996] 5 MLJ 1, Nik Hashim JC (as he then was) relying on the dictum of Lee Hun Hoe CJ (Borneo) in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 (FC) at p 251 (a case involving a preventive detention under the Preservation of Public Security Ordinance 1962 of Sarawak) ruled that the material provisions of the law authorizing detention without trial must be strictly construed and where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. He formulated the following condition precedents that must be present before the magistrate can issue an order to detain a drug dependant under s 6(1) of the Act at pp 4–5:

(1) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest (see art 5(3) of the Federal Constitution);

(2) The person to be detained is certified by a government medical officer or a registered medical practitioner to be a drug dependant (see s 6(1) of the Act);

(3) The person to be detained must be given the opportunity of making representations and not merely appeals and pleas (see s 6(1) of the Act; *Hoo Thian Siong v PP* [1988] 2 MLJ 401);

(4) The magistrate must consider a report by a rehabilitation officer:

(a) a copy of such report must be supplied to the person to be detained; and

(b) such report must be read out and explained to him (see s 6(3) of the Act: *Re Haji Sazali* [1992] 2 MLJ 864);

(5) In making the order, the magistrate must have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person to be detained (see s 6(4) of the Act; *Re Haji Sazali* [1992] 2 MLJ 864);

(6) The magistrate must keep a record of the proceedings and the fact that the conditions precedent in sub-ss (1), (3), (4) and (5) of s 6 are complied with (see *Re Roshidi bin Mohamed* [1988] 2 MLJ 193).

In *Kamaruzaman bin Yahaya v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1997] 5 MLJ 256, habeas corpus was issued merely on the technicality that the form on which the medical examination was conducted on the detenu failed to state that he was a 'government' medical officer. It was held that by the absence of the word 'Kerajaan' after the words 'Pegawai Perubatan' on the certificate, the certificate purportedly signed by the government medical officer was not receivable by the magistrate.

It was also held in that case (following *Mahmod bin Jaudin v Penguasa Pusat Serenti Sungai Besi Selangor & Ors* [1996] 3 AMR 2920) that it was incumbent upon the magistrate to explain to the detenu who was not represented by counsel the meaning of the word 'representations' and the significance and purpose of making representations to the applicants, so that with the explanations, they would know their rights and consequences of the proceedings.

The same stringent approach was followed in *Mohd Shahriman Mohd Khairil v PP & Anor* [1998] 2 CLJ 855. In that case Suriyadi J, after having reviewed a number of authorities on preventive detention found that the notes of proceedings recorded by the magistrate did not disclose that she had considered the report of the rehabilitation officer and the character, antecedents, age, health, education, and family background of the subject as required under the previous sub-ss (3) and (4) of s 6 of the Act, which he held were mandatory. There were also doubts whether the subject was accorded the opportunity to make representation before she made the order and the medical report that was submitted was not a report pertaining to the subject's addiction to drugs but merely a report of the urine tests conducted on him. Accordingly he held that the proceedings before the magistrate was tainted with so many procedural and evidential flaws that habeas corpus for the subject's release from the rehabilitative centre must be issued.

The attitude adopted by the High Court in not distinguishing cases of rehabilitative detention from cases of preventive detention was hardly surprising — for although the objective of the Act was social in nature, s 6 of the Act before the amendment, was framed with the liberty of the subject uppermost in the mind of the legislature over and above the need to treat and rehabilitate the drug dependant. As Hashim Yeop Sani SCJ in *Ang Gin Lee v PP* [1991] 1 MLJ 498 at p 501 said:

> We appreciate that the provision of s 6 of the Act, is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for two years to undergo treatment probably against his will. At the same time we also appreciate that it is a provision designed for the rehabilitation of drug dependants. It is a social legislation of sort. But we must not forget however that the same legislation confers summary powers on the magistrate and can seriously affect the freedom of an individual.

Hence under the previous s 6, before the magistrate can be satisfied (after giving him the opportunity to make representation) either to sent the subject for treatment and rehabilitation at a rehabilitation centre under sub-s (1)(a), or to place the subject under the supervision of the

A rehabilitation officer under sub-s (1)(b) he must have 'regard to the circumstances, character, antecedents, age, health, education, employment, family and other circumstances' as provided under sub-s (4). He was also obliged under sub-s (3) to consider the report of the rehabilitation officer and to provide a copy of the report to the subject.

B *The amended s 6*

Since the decision in *Sanuar Kamarudin* however, s 6 of the Drug Dependant (Treatment and Rehabilitation) Act 1983 has been amended to take effect from 1 September 1998.

C The current s 6(1) now reads as follows:

> 6 Magistrate's order which may be made on a drug dependant
>
> (1) Where a person who has undergone the tests referred to in s 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug
>
> D dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations —
>
> (a) order such person to undergo treatment and rehabilitation at a rehabilitation centre specified in the order for a period of two
>
> E years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or
>
> (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

F *The consequence of the amendment: the need to apply the law objectively*

By removing the preconditions that must be observed by the magistrate before making the order, the new provision has now brought the objective of the Act, that is to say, the treatment and rehabilitation of drug dependants, into sharp focus.

G Unlike the former, the new s 6 of the Act now no longer requires the subjective satisfaction of the magistrate that the detenu has to be sent for treatment and rehabilitation before he can make the order of detention. Neither is he now required to consider the report of the rehabilitation officer and to provide the detenu with a copy thereof; nor need he comply with the
H requirement of the former sub-s (4) to have 'regard to the circumstances, character, antecedents, age, health, education, employment, family and other circumstances' of the detenu, before making the order. In fact the magistrate is now duty bound to order the detenu to either undergo treatment, rehabilitation and supervision under sub-s (1)(a) or to order him to undergo supervision only under sub-s (1)(b), upon receiving the
I recommendation of the rehabilitation officer.

With the objective of the Act now sharply in focus there is now in my view a need to treat an application for habeas corpus against a detention

made thereunder differently from those involving preventive detention per se — for the following reasons:

A preventive (as opposed to rehabilitative) detention involves the exercise by the detaining authority of special powers against subversion, organized violence, crimes prejudicial to the public, under laws promulgated under art 149 in Part XI of the Federal Constitution. Its objective is basically to segregate persons who pose a threat to the well-being of society at large and is resorted to only because for one reason or other it is deemed inexpedient to put the detainee on trial. There are compelling reasons why preventive detention of the subject by the executive is subject to close judicial scrutiny. They are described adequately in the speech of Lee Hun Hoe CJ Borneo in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at pp 250–251:

> Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is proved to have committed an offence punishable under certain provisions of the penal law. Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.
>
> One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, art 5(1) of the Constitution guarantees that 'no person shall be deprived of his ... liberty except in accordance with the law'. If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

On the other hand the objective of a detention under s 6 of the Drug Dependant (Treatment and Rehabilitation) Act 1983 is not preventive; rather, it is rehabilitative and undertaken primarily for the well-being of the drug dependant himself — the detention being merely incidental to achieving that purpose — a means to an end. It is therefore a social legislation and in view of the prevalence of drug abuse in the country, urgent and necessary.

A rehabilitative detention (as opposed to preventive detention) clearly therefore does not encroach into 'the realm of the liberty of the subject' as envisaged in *Re Dato' James Wong*. There would accordingly, be

less need to keep such high vigilence as one would in preventive detention cases.

To apply the same stringent criteria to issue habeas corpus against a rehabilitative detention order made by a magistrate under the Act as one would in preventive detention made under special powers would undermine its social objective of treating and rehabilitating drug dependants — an act which this court must refrain from doing unless the order made is from the objective stand point legally unsustainable.

I am therefore of the view that with the amendment to s 6 of the Act, the strict approach leaning in favour of the detenu as enunciated in *Sanuar Kamarudin* requiring numerous condition precedents before the order could be made by the magistrate should no longer be followed.

I would therefore have to accept as correct the submission of the senior federal counsel that all that is required of the magistrate before making the order under the current s 6 of the Act is to ensure that:

(i) the medical certificate shows the detenu is a drug dependant;

(ii) the rehabilitation officer has recommended that the detenu be sent for rehabilitation at a rehabilitation centre and,

(iii) the detenu is afforded the opportunity to make representation.

To the extent that purely technical defects are allowed to invalidate a preventive detention order, the same in my considered view, should not now apply to a rehabilitative detention order made by a magistrate under the amended s 6(1) of the Act.

Nevertheless habeas corpus may still issue against detention- made under the new s 6(1) of the Act. But it ought to be issued only in such instances as when it could be determined with certainty that the detenu had not undergone any medical lest to determine whether he was a drug dependant or where the medical officer or medical practitioner's certificate did not actually certify that the detenu is a drug dependant; where the rehabilitation officer did not in fact recommend an order of detention should be made; or where the magistrate had not given the detenu the opportunity to make representation — all of which in each particular case would have made the detention unsustainable and unlawful. However, habeas corpus should not be issued merely on such technicality as where the word 'Kerajaan' has not appeared after the words 'Pegawai Perubatan' in the medical certificate issued by the medical officer as was decided in *Kamaruzaman bin Yahya* where there could be no reason to doubt the bona fide of the certificate.

The present application

The present order of the magistrate was made on 16 September 1999 and therefore had to be considered under the amended s 6 of the Act. It follows therefore the applicant's challenge on the legality of a rehabilitative detention made by a magistrate in the present case should be limited only to such direct defects that would make the detention unsustainable. Bearing in mind the clear objective of the older to rehabilitate rather than to detain,

the contra preferentum rule enunciated by Hashim Yeop Sani SCJ in *PP v Koh Yoke Koon* in respect of preventive detention cases, that in cases of doubt the court should lean in favour of the subject should not now apply. Instead the court should adopt an objective approach to examine whether any inconsistency or for that matter any perceived impropriety made by the magistrate could be condoned without so much as having to compromise on the legality of the detention itself.

Having defined the perimeter within which the present application should be determined into, my findings on the three grounds raised by counsel follows.

Whether Gurdeep Singh was allowed to make representation

Suriyadi J in *Mohd Shahriman* citing the judgment of Mustapha Hussain J in *Hoo Thian Siong v PP* [1988] 2 MLJ 401 on the meaning of 'representation' appearing in s 6(1) of the Act said that (at p 865):

> Making representation here is not the same as making appeals or pleas. Making representation here means the right to protest, which by necessary implication and reading in the context of art 5(3) of the Federal Constitution, is a right to challenge whatever is being brought against him.

I would agree entirely with the above defination with respect to the meaning of 'making a representation'. But s 6(1) of the Act merely requires the magistrate to give the detenu an opportunity to make representation. It did not require the magistrate to ensure that he must make representation at all costs. The question that one should be directed to ask here is therefore quite simply:

Did the magistrate give the detenu the opportunity to make representation?

The record shows that the two reports, one by the Pegawai Perubatan and the other by the Pegawai Pemulihan Dadah had been handed over and explained to him. It also shows in the space 'Representasi dari penama:' that Gurdeep Singh had said he had a lorry and that if he was to be detained, no one would be paying for the installments due on the lorry. The record also shows that the detenu had applied to be considered for the supervisory order under s 6(1)(b) instead.

Viewed from an objective standpoint, it is clear here that Gurdeep Singh did not wish to make any representation against the adverse reports of the Pegawai Perubatan and the Pegawai Pemulihan — as by asking to be put under supervision instead of being sent for rehabilitation, he must be taken to have admitted to being a drug dependant and therefore had no basis to make any representation against it. He could had he wanted to, challenged the allegation against him which he did not.

The allegation that he had not been given the opportunity to make representation must therefore be dismissed as untrue.

To take the issue further, it may be argued on the authority of *Kamaruzaman bin Yahya* that unless the magistrate explained to the detenu his right to make representation and also the meaning of making

representation, the detenu would not be in a position to avail himself of his right. To settle this issue I prefer the contrary views expressed by Abdul Wahab J in *Chiew Kam Sing v Ketua Institusi Pusat Pemulihan Kampung Selamat & Ors* (Wilayah Persekutuan Permohonan Jenayah No 44–36–99) at p 8:

> I would however hesitate to go so far as to say it is incumbent upon presiding magistrates to explain the meaning of the word 'representations', and the significance and purpose of making representations, 'so that with the explanations, they would know their rights and the consequences of the proceedings. Every person is deemed to know the law, and ignorance of the law is no excuse. To place an additional responsibility upon an already overburdened magistrate is not a step to be lightly taken: see *Re Muhamad Ali Hamid* [1999] 3 CLJ 343. The act merely requires that the subject be given an opportunity to make representations: see *Mahmod bin Jaudin v Penguasa Serenti Sungai Besi Selangor & Anor* [1996] 3 AMR 2920. To explain the meaning of the word 'representations', and the significance and purpose of making representations, so that with the explanations, the subject would know his right and the consequences of the proceedings is, to my mind, to extend the duty of the magistrate to the realm of giving legal advice, well beyond giving an opportunity to make representations.

To what has been said in *Chiew Kam Seng*, I would add that so long as one can reasonably conclude by a close examination of the record (as in the instant case) that the detenu had been afforded the opportunity to make representation, the requirement of s 6(1) is satisfied.

The submission on this ground must fail.

Magistrate relying on s 6(3) and (4) of the Act which had been amended

The note of proceedings made by the magistrate with respect to the order to detain the detenu for treatment and rehabilitation discloses the following scribble:

> Perintah Mahkamah: Seksyen 6(3) dan s 6(4), di bawah s 6(1)(a) penama dimasukkan ke Pusat Serenti Sg Ruan, Pahang selama dua tahun.

By scribbling down the two subsections in his notes it is fairly obvious that the magistrate had meant to put on record that in making the order for detention he had considered and was satisfied with the report of the Pegawai Pemulihan under sub-s (3) and the antecedents of the detenu under sub-s (4) which under the previous s 6 a magistrate making the order was obliged to consider.

When the magistrate made the order (on 16 September 1999), s 6 of the Act had been amended. The previous sub-s (3) and sub-s (4) were no longer in existence. It follows that if the strict approach enunciated by Nik Hashim JC in *Sanuar Kamarudin* is applied to decide on the legality of the order, then one is entitled to conclude that the magistrate had taken into consideration extraneous and irrelevant matters in making that order and therefore the detention must be unlawful.

But one must bear in mind that under the amended s 6 of the Act the subjective satisfaction of the magistrate is now no longer required before he

decides to send the detenu for treatment and rehabilitation. In fact he is now required to act as a matter of course to make the order upon receiving the recommendation of the rehabilitation officer. From the objective standpoint therefore, the fact that he may have taken irrelevant or extraneous matters (under the previous sub-s (3) and (4)) into consideration in making that order is of no consequence as he is required to make the order regardless.

The submission on this ground must also fail.

The discrepancy between the report of the Pegawai Pemulihan and the Certificate of the Pegawai Perubatan — the effect of the failure of the magistrate to appreciate it

The Certificate as to Drug Dependency (Perakuan tentang Penagihan Dadah) of the medical officer (exh KMS–2D) clearly states that Gurdeep Singh was addicted to the drug morphine whereas the report of the rehabilitation officer (Laporan Pegawai Pemulihan — exh KMS-2B at para 3) states the medical officer had certified him to be addicted to the drug heroin.

The discrepancy gave rise not only to doubts as to the nature of the drug the detenu had become dependant on but also to the wider question of whether he was a drug dependant in the first place to justify the making of the order under s 6(1) of the Act.

The rehabilitation officer is duty bound to make a proper and accurate inquiry on the status of the detenu before he submits his recommendation to the magistrate. Where it is plain from the record that he had stated the detenu was dependant on heroin when the medical officer's certification clearly states that he was dependant on heroin and not morphine, it must be assumed that the rehabilitation officer had failed to direct his mind to and therefore had failed to determine that the detenu was dependant on any drug. In order to properly consider whether the detenu was a drug dependant he must be able to state with precision on what drug or drugs in particular was the detenu dependant on so that he can be properly treated and rehabilitated.

The order made by the magistrate was under the circumstances absolutely unsustainable as the discrepancy was so fundamental as to have affected its legality having struck at its very objective of treating and rehabilitating drug dependants.

It was also serious enough to affect the integrity of the rehabilitation officer on whom the magistrate had to rely on in making the order to send the detenu to the rehabilitation centre, that he should not have made the order.

On this ground alone habeas corpus must issue.

Order accordingly.

Reported by Jafisah Jaafar